Tristram and Coote's Probate Practice, twenty-second edition, page 384, under the heading of issue of grant concerning administration *pendente lite* states:—

"If an order is made appointing an administrator, the practitioner should prepare and lodge at the Principal Probate Registry, the papers to lead the grant, i.e. the administrator's oath (form No. 173), an administration bond (form No. 61), affidavit of justification of sureties (form No. 24). a declaration of the estate (form No. 82), an Inland Revenue affidavit and the order on summons appointing the administrator. The grant is always of administration"

See also *Halsbury's* Law of England, 3rd Edition, Vol. 16, page 246, paragraph 459.

The question in this case is whether the order of 23rd February, 1968 is enough to clothe plaintiff as an administratrix without a grant of letters of administration. The answer in my opinion, is in the negative. The order states quite clearly that pending trial plaintiff be appointed administratrix of the two estates. The court has exercised its discretion in favour of plaintiff, widow of Sim Chu Kwang deceased. The order merely means that she is entitled to be appointed administratrix *pendente lite*. Until she obtains the grant she clearly cannot claim to act in a representative capacity. Therefore she could not properly described herself as administratrix in the writ of summons. In *Chia Teck Liang* v. *Tan Soo Khiang* [6] the assistant registrar made an order that letters of administration should issue to appellant but that letters had not been granted under seal in the form prescribed in accordance with section 70 of the Probate and Administration Enactment. Mills J. held that the order granting administration did not constitute a grant within the meaning of the section. In construing the section he used these words:—

"The court must hold, in my opinion, that the overriding words are 'grant the same under seal': it is quite clear that when the judge makes an order on the Bench to the effect that letters of administration shall issue to the petitioner, he does not make a grant under seal."

That precisely is the position in this case. The order of 23rd February, 1968 does not constitute a grant under seal in the form prescribed. Section 78 of the Probate and Administration Ordinance (Cap. 109) makes it clear. Subsection (2) of the section reads:—

"When it appears to the court that letters of administration to the estate of person deceased, with or without a copy of the will annexed, should be granted the court shall grant the same under its seal in the form prescribed."

From the authorities it seems clear that the law on the matter is the same whether a person sues as administrator or is being sued as such if he has not extracted letters of administration at the commencement of action. The writ must be regarded as a nullity from the beginning and be set aside. Perhaps the plaintiff may consider taking the matter higher where a binding decision would be welcome. But for myself for reasons given I would dismiss the plaintiff's action with costs.

Action dismissed.

KABATASAN TIMBER EXTRACTION CO. v. CHONG FAH SHING

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and MacIntyre F.J.) January 30, 1969]

[Kota Kinabalu — Federal Court Civil Appeal No. X75 of 1967]

Contract — Breach of — Damages — Duty to mitigate loss.

In this case the appellants had contracted to supply timber to the respondent to be delivered at the site of the sawmill to be erected by the respondent. The timber was delivered in three lots. The learned trial judge found that the 2nd lot of 198 logs and 4 of the 22 logs in the 3rd lot were not delivered to the respondent, as they were dumped at a distance of more than 500 feet from the sawmill. The learned trial judge gave judgment for the appellant for $9,892.41 being the balance due under the contract and also awarded damages to the respondent on his counterclaim for breach of contract for the sum of $13,192.40.

Held, dismissing the appeal in respect of the claim and allowing the appeal in respect of counterclaim by reducing the amount: it was the duty of the respondent in this case to take reasonable steps to mitigate the damage. There was no need for the respondent to have gone to the expense of buying logs from elsewhere when the logs were lying a few hundred feet away from the sawmill and all that was required was the additional expense for hauling them up to the sawmill. The appropriate damages to be awarded to the counterclaim was the approximate cost of hauling the logs to the sawmill, which amounted to $1,000.

Cases referred to:—

(1) *Brace* v. *Calder* [1895] 2 Q.B. 253.

(2) *Payzu Ltd.* v. *Saunders* [1919] 2 K.B. 581.

(3) *Finlay (Fames) & Co. Ltd.* v. *N.V. Kwik Hoo Tong H.M.* [1929] 1 K.B. 400.

(4) *Pilkinton* v. *Wood* [1953] Ch. 770.

FEDERAL COURT.

Michael K.M. Yong for the appellants.

Shelley Yap Yeok Siew for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: The appellants, the Kabatasan Timber Extraction Company, sued the respondent, a sawmiller, for a sum of $40,129.31 being the alleged balance of the price of 41,069 cubic feet of timber sold and delivered under an agreement dated December 6, 1963. In his defence, the respondent admitted liability to the extent of $2,044.81, but subject to a counterclaim for $37,967.20 for damages arising from a breach of contract by the appellants. The learned trial judge found that the appellants

delivered some 19,173 cubic feet of timber valued at $25,913.80 and that the respondent had paid to account of some sums amounting to $16,041.37, inclusive of an advance deposit of $5,000. Accordingly, he entered judgment for the appellants for the outstanding balance of $9,872.41 and costs. With regard to the counter-claim, the learned judge awarded damages in the sum of $13,192.40 of which a sum of $12,992.40 was for loss of profit arising out of the failure to supply 10,827 cubic feet of timber being the difference between the quantity agreed to be delivered and the quantity actually delivered; and a sum of $200 for extra cost incurred by the respondent in hiring a tractor to haul logs which had been placed, contrary to the terms of the contract, at some distance from the site of the sawmill.

The facts of the case are as follows. The appellants having obtained a concession to cut and remove timber from Pitas Estate at Kabatasan, contracted under the aforesaid agreement to supply to the respondent such timber they themselves did not require for export, namely, camphor, serayah, oba sulu and selangan batu, to the extent of not less than 30,000 cubic feet, based on the measurements made by the Forest Department for the purpose of collecting royalty. It was agreed that the logs were to be delivered at the site of the sawmill to be erected by the respondent in Pitas Estate on a licence to be obtained by the appellants from the Forest Department. It was further agreed that, on delivery and acceptance of any quantity of timber, the respondent should pay 30% of the price at the agreed rates within 3 days of delivery and the balance within three calendar months from date thereof.

Subsequently, the appellants applied for and obtained a licence in their name to build and operate a sawmill and the respondent built the sawmill at a site mutually chosen by the parties. The site chosen was near the confluence of the Kabatasan River and a tributory and close to the "Penkalan" or place from which the appellants floated their exportable timber to the sea. Consequently, the space for dumping the logs close to the sawmill was available on one side of the sawmill only, the other three being too close to the waterfront. Because of this problem, the question arose at the trial as to what was a reasonable distance from the sawmill for the logs to be deposited in order to constitute delivery "at the site" as stipulated in clause 3 of the agreement. The learned trial judge held that a distance of 500 feet from the sawmill was the limit within which the logs should have been delivered to constitute delivery at the site.

Hong Kee Sui, the managing partner of the appellant firm, deposed at the trial that his company had delivered 41,069 cubic feet of timber to the respondent in 3 lots, namely, the 1st lot consisting of 207 logs measuring 17,303 cubic feet in March, 1964, the 2nd lot consisting of 198 logs measuring 20,793 cubic feet at the end of May, 1964, and the 3rd lot consisting of 22 logs measuring 2,973 cubic feet in June, 1964. In regard to the 1st and the 3rd lots, Hong Kee Sui produced debit notes signed by the respondent acknowledging receipt of the same but, in regard to the 2nd lot, he produced a debit note which was not signed by the respondent. The witness averred, however, that the respondent had accepted delivery of the 2nd lot of logs because they were measured by an official of the Forest Department only after he had selected them. The trial judge held that the appellants had failed to deliver the 2nd lot of logs "at the site" because they were dumped at a distance of more than 500 feet from the sawmill. In regard to the 3rd lot of 22 logs, the respondent admitted delivery of 18 logs only measuring 1,870 cubic feet. These logs were said to have been towed down the Kabatasan River to Kudat for delivery to another sawmill operated by the respondent at a place called Sequati.

The respondent has not cross-appealed and therefore there is no dispute in this appeal regarding the delivery of 207 logs and 18 logs measuring 19,173 cubic feet. The questions raised before us were:

(1) whether the trial judge was justified in holding on the evidence that the 2nd lot of 198 logs and 4 out of the 22 logs in the 3rd lot were or were not delivered to the respondent? and

(2) whether the trial judge was justified in assessing damages at $13,192.40 on the basis of loss of profit?

In regard to the question of delivery of the 198 logs, the learned judge in holding that they were not delivered "at the site" took into consideration the fact that the appellants were partly responsible for creating the problem of space by agreeing to the site where the mill was erected; that they knew from the very first that the mill was equipped with a winch capable of hauling logs from a distance of 500 feet only; and that in about July, 1964, they sold their interest in the timber concession to another company, known as the Kinabalu Company, together with their tractor which was formerly used to haul the timber to the vicinity of the sawmill as the work progressed. Thus, the learned judge appears to have considered with care every aspect of the evidence and we can find no reason for disagreeing with his finding

that the 2nd lot of 198 logs was not delivered to the respondent at the site of the sawmill.

In regard to the 4 logs, apart from the reasons given by the learned trial judge, the debit note, Exhibit P.7, clearly shows that, despite the acknowledgement of receipt of 22 logs by the respondent, only 18 logs were towed to the respondent's sawmill down the river. No evidence was called to prove that the remaining 4 logs were ever delivered to or removed by the respondent. We again see no reason to upset a finding of fact by the trial judge.

In regard to the claim for damages arising out of the short-supply of timber, it is clear from the evidence that had the appellants delivered the 2nd lot of 198 logs at the site of the sawmill, the total amount delivered would have far exceeded the minimum requirement. It is not denied that 198 logs were dumped some distance away from the sawmill. There is also no doubt that the logs were measured by the Forest Department and the appellants had paid the royalty on them. The breach of contract in this case was not a repudiation of the contract as a whole but a failure to deliver one consignment within 500 feet of the mill, owing to want of space. The contract provides that the measure of damages should be the difference between the agreed price and the prevailing market price to the extent of the amount in short supply plus transport expenses. The law, however, imposes a duty on every person who suffers damages on account of breach of contract to take reasonable steps to mitigate the damage. In *Anson's* Principles of the English Law of Contract, 22nd Edition, at page 504, the following passage appears:—

"It also follows from the rule that damages are compensatory only that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

"Thus, although the measure of damages for breach of a contract to deliver goods is ordinarily the difference between the contract price of the goods and the market price at the time when delivery should have been given, yet if the plaintiff might have mitigated his loss, for example, by any immediate purchase at a low price of goods to replace those not delivered, or by accepting a reasonable offer from the defendant to make good part of the loss, this is to be taken into account in assessing his damages (*Brace* v. *Calder*,(1) *Payzu Ltd.* v. *Saunders* (2)). It is a question of fact in each case whether he has acted as a reasonable man might have been expected to act, and he is not required to risk his commercial reputation *Finlay (Fames) & Co., Ltd.* v. *N.V. Kwik Hoo Tong H.M.*(3)) or to embark upon complicated litigation (*Pilkington* v. *Wood*,(4)) in order to mitigate his loss."

In the instant case, there was no need for the respondent to have gone to the expense and trouble of buying logs from elsewhere when the logs were lying a few hundred feet away from the sawmill for the mere taking and all that was required was additional expense for hauling them up to the sawmill. Instead of doing that, the respondent claims to have purchased timber to make good the shortage and produced certain bills which were admitted in evidence and marked Exhibit D.5. It is significant that the learned trial judge did not refer to them in his judgment. He must have had a good reason for ignoring them. They relate to purchases made between May and August, 1965 and the transactions appear too remote to be connected with the appellants' failure to deliver timber in June, 1964.

We think that the appropriate damages to be awarded in this case should be the approximate cost of hauling the lodge to the sawmill. The respondent said in evidence that in August, 1964, after the appellants had sold their timber concession to Kinabalu Company, they offered to arrange with that company to haul the logs to the sawmill but he had rejected the offer. He also said and I quote: "The Kinabalu Company wanted $1,000. I told them I could not pay. Finally they accepted $200 for hauling the logs. The tractor did not tow the the logs. It did not go at all." In our opinion, the appropriate amount of damages to be awarded in this case should be $1,000.

The appeal against the judgment of the court below in respect of a claim in the suit is hereby dismissed with costs and we allow the appeal in respect of the counter-claim by reducing the amount awarded to $1,000 with the cost of the appeal to the appellants.

Azmi L.P. and **Ismail Khan C.J. (Borneo)** concurred.

Appeal in respect of the claim dismissed; Appeal in respect of the counter-claim allowed.

LEONG GAN & ORS. v. TAN CHONG MOTOR CO. LTD.

[O.C.J. (Raja Azlan Shah J.) January 31, 1969]
[K.L. — Civil Suit No. 1970 of 1968]

Contract — Evidence — Admissibility of oral evidence to vary terms of written agreement — Lease which had been registered — Oral agreement between parties — Whether admissible — Evidence Ordinance, 1950, s. 92.

Evidence — Admissibility of oral evidence to vary term of written agreement — Evidence Ordinance, 1950, s. 92.

Practice and Procedure — Action for recovery of land — Order 14.

Under the terms of 2 leases both duly registered, a piece of land owned by the applicants was leased to the respondents for a period of 4 years. In an